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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE DISTRICT OF ARIZONA

18 United States of America,

19 Plaintiff,

20 v.

21 Abdul Malik Abdul Kareem,

22 Defendant.

23 No. CR-15-00707-01-PHX-SRB

24 **RESPONSE TO MOTION TO COMPEL
25 DISCLOSURE RE RE-SENTENCING**

26 The United States, through undersigned counsel, respectfully requests the Court
27 deny defendant Abdul Malik Abdul Kareem's Motion to Compel Disclosure re Re-
28 Sentencing (CR 701). Defense counsel is seeking early disclosure of identifying
information regarding the government's prisoner witnesses without providing any
safeguards to protect their safety. Providing full *Giglio* and Jencks Act discovery regarding
the prisoner witnesses without appropriate safeguards will unduly place them in grave
danger in the prison setting.

29 At the status hearing on July 29, 2021, the Court encouraged the parties to come to
30 an agreement on a protective order so the government could provide more detailed
31

1 discovery to the defense that would reveal the identities of the prisoner witnesses.¹ (CR
2 700.) Both government and defense counsel indicated they were amenable to entering into
3 such an agreement. The Court noted that if the parties were unable to agree on the terms
4 of a protective order, it would allow the government to disclose information revealing the
5 identities of the prisoner witnesses “very late.”

6 Government counsel conferred telephonically with defense counsel on at least three
7 occasions between the date of the hearing and the date of the instant Motion to Compel.
8 Aside from referring to the original protective order in this case (CR 44), which related to
9 the identities of juveniles and personally identifying information of third parties in the case
10 and was more concerned with privacy rights than safety, defense counsel did not propose
11 limitations that would protect the safety of the prisoner witnesses.²

12 Having not received a satisfactory proposal from defense counsel, on Friday,
13 September 10, 2021, undersigned counsel emailed a draft motion and protective order for
14 defense counsel to review. (Attachment 1.) In the email, undersigned counsel expressed
15 the government’s desire to provide earlier discovery regarding the prisoner witnesses with
16 restrictions on dissemination to protect them from the grave risk of harm they face in the
17 prison setting. Specifically, the government offered to provide earlier disclosure of “their
18 criminal histories, any relevant portions of their prison disciplinary histories, their cell
19 locations (and Kareem’s) during the times they were housed at FCI Florence with Mr.
20 Kareem, and other information that would be pertinent under *Giglio*.” (Attachment 2.)

21 Without further contact, Kareem filed the instant motion the evening of September
22 10, 2021.

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25 ¹ The Court also referenced the defense’s desire to interview certain government witnesses
26 from ATF prior to sentencing. The defense has not identified which witnesses it seeks to
interview. *See Doc. 701-1.*

27 ² The parties later informally agreed to include additional sensitive disclosure within the
28 terms of the protective order. The protection of that information likewise was not related
to witness safety.

1 A. The Materials Sought are not Rule 16 Materials

2 Kareem cites Federal Rule of Criminal Procedure 16 in support of his request. By
3 its own terms, Rule 16 applies only to items that are material to preparation of the defense,
4 items the government intends to use in its case-in-chief at trial, or items obtained from or
5 belonging to the defendant. Fed. R. Crim. P. 16(a)(1)(E). The items Kareem seeks do not
6 fall within the scope of Rule 16.

7 First, the items are not material to preparation of the defense. The United States
8 Supreme Court has construed “defense” in Rule 16(a)(1)(E)(i) to mean defense against the
9 government’s case-in-chief at trial. *United States v. Armstrong*, 517 U.S. 456, 462-63
10 (1996) (defendant sought expansive discovery of other criminal investigations to support
11 motion to dismiss based on selective prosecution of African-American defendants). In this
12 context, the Supreme Court explained that Rule 16(a)(1)(E)(i) authorizes disclosure only
13 of those items that are helpful to rebutting the elements of the crimes charged. None of the
14 items relating to the prisoner witnesses relate to the elements of the offenses for which
15 Kareem stands convicted.

16 Second, the items Kareem seeks relate to sentencing, not the government’s case-in-
17 chief at trial. Third, the items were not obtained from and are not the property of Kareem.

18 Even assuming Kareem has made a threshold showing that the items fall within the
19 scope of Rule 16, discovery under Rule 16 is bounded in additional ways. For example,
20 Federal Rule of Criminal Procedure 16(a)(2) specifically exempts from disclosure all
21 “reports, memoranda, or other internal government documents made by an attorney for the
22 government or other government agent in connection with investigating or prosecuting the
23 case.” Subsection (a)(2) further exempts from disclosure “statements made by prospective
24 government witnesses,” except as otherwise authorized in 18 U.S.C. § 3500. *Id.*

25 The Ninth Circuit analyzed the scope of this exemption in *United States v. Fort*, 472
26 F.3d 1106, 1120-21 (9th Cir. 2007). The Court construed “government agent” to include
27 “non-federal personnel whose work contributes to a federal criminal case,” and “case,” in
28 turn, to encompass an investigation that culminates in the federal prosecution of the

1 defendant. *Id.* at 1110-21 (holding Rule 16(a)(2) exempted from disclosure local agency
2 reports created prior to federal involvement but relinquished to federal prosecutors to
3 support a unified prosecution of defendants for the same criminal activity that was the
4 subject of the local investigation); *cf. Armstrong*, 517 U.S. at 462-63 (characterizing Rule
5 16(a)(2) as precluding discovery of “government work product in connection with [the
6 defendant’s] case”); *cf. also United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir.
7 2003) (law enforcement canine training materials and records not protected from disclosure
8 under Rule 16(a)(2) because “they were not made in connection with investigating or
9 prosecuting this or *any other case*” (emphasis added)). Thus, even items material to
10 preparing the defense may be withheld, so long as they are not exculpatory, pursuant to
11 Rule 16(a)(2).

12 **B. The Materials Sought are not Exculpatory**

13 Under *Brady v. Maryland*, 373 U.S. 83 (1963), the government must disclose
14 information favorable to the accused that is material either to guilt or to punishment.
15 *United States v. Lucas*, 841 F.3d 796, 807 (9th Cir. 2016). None of the materials Kareem
16 seeks would serve to exculpate Kareem or mitigate his culpability. Therefore, the materials
17 do not qualify as *Brady* material in that sense. However, some of the materials relate to
18 prior witness statements and/or impeachment of the prisoner witnesses and are
19 discoverable on those bases.

20 **C. Some Materials Sought are Within the Scope of the Jencks Act and/or *Giglio***

21 The Jencks Act, 18 U.S.C. § 3500, requires the government to disclose previous
22 statements of its witnesses after each witness has testified. The text of § 3500 is clear:

23 In any criminal prosecution brought by the United States, no statement or
24 report in the possession of the United States which was made by a
25 Government witness or prospective Government witness (other than the
defendant) shall be the subject of subpena, discovery, or inspection until said
witness has testified on direct examination in the trial of the case.
26 18 U.S.C. § 3500(a). *See United States v. Taylor*, 802 F.2d 1108, 1118 (9th Cir. 1986)
27 (order requiring early disclosure of statements made by prospective government witnesses
28 “was itself inconsistent with the express provision of the Jencks Act and therefore

1 unenforceable"). Federal Rule of Criminal Procedure 26.2 mirrors the Jencks Act and
2 imposes no additional production burden on the government.

3 Although not required to do so until after the witnesses testify, the government
4 previously disclosed the written statements of two of the prisoner witnesses – a letter from
5 Witness 1 and handwritten notes from Witness 2. The only redactions were to portions of
6 the statements that would identify the witnesses. In addition, the government disclosed
7 reports of interviews for the three prisoner witnesses, again redacted to protect the identities
8 of the witnesses. The government also disclosed Kareem's mail, phone, and email logs
9 from FCI Florence, and reports analyzing his recorded calls and non-attorney email
10 messages.

11 Absent a satisfactory protective order, the government further intends to produce
12 the following materials in advance of the sentencing hearing, with redactions to protect
13 those witnesses' identities:

- 14 • Transcripts of recorded interviews of two of the prisoner witnesses (the third
15 witness's interview was not recorded)
- 16 • Reports of attorney-conducted interviews of the three witnesses
- 17 • Criminal histories and related *Giglio* material
- 18 • Relevant portions of their prison disciplinary histories
- 19 • 302 reports (if they exist, awaiting responsive information) to document the FBI
20 Denver Field Office's closure of its investigation

21 The reports previously disclosed to the defense note the prisoner witnesses desired
22 to have their sentences reduced. As documented in forthcoming reports, undersigned
23 counsel informed the witnesses that the U.S. Attorney's offices in the districts that handled
24 their prosecutions have stated that they would be amenable to filing Rule 35 motions if the
25 witnesses provide truthful testimony, but no promises or agreements have been made in
26 exchange for their testimony

27 Additional materials in the government's possession would negatively impact the
28 witnesses' credibility, and therefore fall within the scope of *Giglio*. Again, the government

1 has offered to provide that information to the defense well in advance of the hearing,
2 subject to a protective order that adequately protects the safety of the prisoner witnesses.

3 D. Balancing Kareem's Need for Disclosure Against the Risk of Harm to the Witnesses

4 The value of the *Giglio* material regarding the prisoner witnesses is likely to be
5 significantly less in the circumstances of this hearing than it would be in the context of a
6 jury trial. The defense and the Court are aware that the prisoner witnesses are federal
7 inmates who have been in custody for at least two years. It goes without saying they all
8 have felony convictions. Further, common experience suggests prison inmates would
9 desire to obtain earlier release, giving them an incentive to provide information to the
10 government in order to achieve that result. *Cf. United States v. Bernal-Obeso*, 989 F.2d
11 331, 333-35 (9th Cir. 1993) (recounting at length the perils associated with cooperators and
12 prison witnesses while noting criminal justice system could not adequately function
13 without such witnesses in certain cases). The Court, as the trier of fact in this instance,
14 already is aware of the credibility issues that accompany prisoner and cooperator
15 testimony. Specific information about the prisoner witnesses' reputations for truthfulness
16 and criminal histories is unlikely to have significant additional impact in these
17 circumstances. Therefore, lengthy and robust investigation into their histories by outside
18 investigators to develop additional impeachment information borders on pointless.

19 On the other hand, the witnesses, as prisoners, face a grave risk of harm when their
20 identities are revealed along with their status as cooperating witnesses. *See United States*
21 *v. Doe*, 870 F.3d 991, 999-1000 (discussing threats of harm to cooperators in the prison
22 setting and their families) (citing Comm. on Ct. Admin. & Case Mgmt. of the Judicial
23 Conference of the U.S., Interim Guidance for Cooperator Information (June 30, 2016),
24 available at http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf). Disclosing their status prematurely places them at unnecessary risk in advance of
25 the re-sentencing hearing. Disclosing their status prematurely also risks their becoming
26 unavailable to testify. Thus, an appropriate balance should be struck between Kareem's
27 need for information and the government's interest in protecting the safety and availability

1 of the prisoner witnesses. *See United States v. Roviaro*, 353 U.S. 53, 60-61 (1957)
2 (defendant's need for information must be balanced against the value of ensuring the safety
3 of informants).

4 To balance these interests, the government anticipates disclosing the *Giglio* and
5 identifying materials on October 15, 2021. This will give the defense time to review the
6 materials, perform additional public-record searches to follow up on specific items deemed
7 worthy of further review, and to prepare additional questions for cross-examination beyond
8 whatever questions they already will have prepared.

9 | E. Conclusion

10 Based on the foregoing, the United States respectfully requests the Court deny
11 Kareem's Motion to Compel Disclosure re Re-Sentencing (CR 701).

Respectfully submitted this 16th day of September, 2021.

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s/Kristen Brook
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JOSEPH E. KOEHLER
Assistant U.S. Attorneys

CERTIFICATE OF SERVICE

19 I hereby certify that on the 16th day of September, 2021, I electronically filed the
20 foregoing with the Clerk of Court using the CM/ECF system, and that true and accurate
21 copies have been transmitted electronically to counsel for the defendant via the ECF
system.

22 Daniel Maynard and Daniel Drake, Attorneys for Defendant

23 By: /s Joseph E. Koehler